Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 96-196
Washington, D.C. 20554

Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation	)))	WT Docket No. 95-157 RM-8643

FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1996 Released: April 30, 1996

By the Commission: Chairman Hundt and Commissioner Quello issuing separate statements.

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I. INTRODUCTION

1. By this *First Report and Order* and *Further Notice of Proposed Rule Making*, we change and clarify certain aspects of the microwave relocation rules adopted in our *Emerging Technologies* proceeding, ET Docket No. 92-9. We also adopt a plan for sharing the costs of relocating microwave facilities currently operating in the 1850 to 1990 MHz ("2 GHz") band, which has been allocated for use by broadband Personal Communications Services ("PCS"). Our plan establishes a mechanism whereby PCS licensees that incur costs to relocate microwave links receive reimbursement for a portion of those costs from other PCS licensees that also benefit from the resulting spectrum clearance. We condition the cost-sharing plan, however, on selection of one or more entities or organizations to administer the plan. Finally, we seek further comment on whether to adjust the negotiation periods by shortening the voluntary negotiation period and lengthening the mandatory negotiation period for the D, E, and F blocks, and whether the negotiation periods for the C block should be subject to the same adjustment. We also seek comment on whether microwave incumbents should be permitted to seek reimbursement from PCS licensees through participation in the cost-sharing plan. We believe that the rules adopted and proposed herein, along with the implementation of an industry sponsored cost-sharing plan, will expedite the clearing of the 2 GHz band in an equitable and efficient manner.

II. EXECUTIVE SUMMARY

2. This Executive Summary summarizes the principal changes and clarifications we are making to the rules we adopted in the *Emerging Technologies* proceeding, the decisions we have made regarding the cost-sharing plan that we proposed in our *Notice of Proposed Rule Making*,[1] and the issues on which we seek further comment. The *First Report and Order:*

- requires that, if the parties have not reached an agreement within one year after the commencement of the voluntary period (or, for A and B block licensees, on the effective date of the new rules), the incumbent must allow the PCS licensee to gain access to its facilities so that an independent third party can prepare an estimate of the cost to relocate the incumbent to comparable facilities;

- clarifies that, if an agreement is not reached by negotiation, the PCS licensee has no obligation to pay for premiums during an involuntary relocation. "Premiums" could include replacing the analog facilities with digital facilities, paying all of the incumbent's transactions costs, or relocating an entire system as opposed to just the interfering links;

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[1] *See* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *Notice of Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 1923 (1995) ("*Cost-Sharing Notice*").

• clarifies that, with respect to mandatory negotiations, we will (1) consider common law principles when interpreting the obligation to negotiate in good faith, (2) require the parties to share pertinent information, (3) place the burden on the party alleging bad faith to provide the Commission with cost estimates for comparable facilities, and (4) consider the following factors when evaluating claims of failure to negotiate in good faith: efforts to obtain estimates of the actual cost of relocating the incumbent to comparable facilities, whether either party has withheld information relevant to relocation, the type of premium requested, if any, and the proportionality of such payment requests to actual relocation costs;

• clarifies that a facility will be deemed comparable for purposes of involuntary relocation if it is equivalent with respect to (1) communications throughput, (2) system reliability, and (3) operating costs;

• limits compensation to incumbents for increased recurring costs associated with the replacement facilities to a five-year time period during an involuntary relocation and limits reimbursement of incumbents' transactional costs during an involuntary relocation to two percent of the "hard costs" involved;

• clarifies that the twelve-month trial period in our rules applies only if an involuntary relocation occurs. Therefore, if the parties decide that a trial period should be established for relocations that occur during the voluntary or mandatory period, the trial period must be provided for in the contract;

• requires that microwave incumbents still operating in the 2 GHz band ten years after the voluntary period has commenced will be required to pay for their own relocation expenses if an emerging technology licensee requires use of the spectrum;

• requires that public safety licensees self-certify that they meet the criteria for extended negotiation periods;

• substantially adopts the cost-sharing plan proposed in the *Cost-Sharing Notice*; the plan is conditioned on selection of an industry administrator to administer the cost-sharing clearinghouse;

• adopts our interim licensing policy for 2 GHz microwave systems, which permits a grant of primary status only for the following limited number of minor technical changes: decreases in power, minor changes in antenna height, minor location changes (up to two seconds), any data correction which does not involve a change in the location of the existing facility, reductions in authorized bandwidths, minor changes in structure heights, changes in ground elevation (but preserving centerline height), and

changes in equipment; all other modifications will be permitted on a secondary basis, unless (1) the incumbent affirmatively justifies primary status, and (2) the incumbent establishes that the modification would not add to the relocation costs of PCS licensees.

The *Further Notice of Proposed Rule Making* seeks comment on:

- whether the negotiation period for the D, E, and F blocks should be adjusted by shortening the voluntary period by one year (*i.e.*, to one year for non-public safety incumbents and two years for public safety incumbents); and lengthening the mandatory negotiation period for these blocks by a corresponding year (*i.e.*, to two years for non-public safety incumbents and three years for public safety incumbents);

- whether the negotiation periods for the C block should be subject to the same readjustments as the negotiation periods for the D, E, and F blocks; and

- whether microwave incumbents should be permitted to seek reimbursement from PCS licensees through the cost-sharing plan.

III. BACKGROUND

A. Relocation Rules Established in Emerging Technologies Docket No. 92-9

3. In the *First Report and Order and Third Notice of Proposed Rule Making* in ET Docket No. 92-9, we reallocated the 1850-1990, 2110-2150, and 2160-2200 MHz bands from private and common carrier fixed microwave services to emerging technology services.[2] We also established procedures for 2 GHz microwave incumbents to be relocated to available frequencies in higher bands or to other media, by encouraging incumbents to negotiate voluntary relocation agreements with emerging technology licensees or manufacturers of unlicensed devices when frequencies used by the incumbent are needed to implement the emerging technology.[3] The *ET First Report and Order* stated that, should negotiations fail, the emerging technology licensee could request involuntary relocation of the incumbent, provided that the emerging technology service provider pays the cost of relocating the incumbent to a

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[2] Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992) (*"ET First Report and Order"*).

[3] *Id.*

comparable facility.[4]

4. In our 1993 *Third Report and Order* in ET Docket No. 92-9,[5] as modified on reconsideration by our 1994 *Memorandum Opinion and Order*,[6] we established additional details of the transition plan to enable emerging technology providers to relocate incumbent facilities. The relocation process consists of two negotiation periods that must expire before an emerging technology licensee may request involuntary relocation. The first is a fixed two-year period for voluntary negotiations -- three years for public safety incumbents, *e.g.*, police, fire, and emergency medical[7] -- commencing with our acceptance of applications for emerging technology services,[8] during which the emerging technology providers and microwave licensees may negotiate any mutually acceptable relocation agreement. Negotiations are strictly voluntary. If no agreement is reached, the emerging technology licensee may initiate a one-year mandatory negotiation period -- or two-year mandatory period if the incumbent is a public safety licensee -- during which the parties are required to negotiate in good faith.[9]

5. Should the parties fail to reach an agreement during the mandatory negotiation period, the emerging technology provider may request involuntary relocation of the existing facility. Involuntary relocation requires that the emerging technology provider (1) guarantee payment of all costs of relocating the incumbent to a comparable facility; (2) complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination; and (3) build and test the new microwave (or alternative) system.[10] Once comparable facilities are made available to the incumbent microwave operator, the Commission will amend the 2 GHz license of the incumbent to secondary status.[11] After relocation, the microwave incumbent is entitled to a one-year trial period to determine whether

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[4] *Id.* at ¶ 24.

[5] Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993) (*"ET Third Report and Order"*).

[6] Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994) (*"ET Memorandum Opinion and Order"*).

[7] The class of public safety incumbents that are eligible for a three year voluntary period are defined in *ET Memorandum Opinion and Order*, 9 FCC Rcd at 1948-49, ¶¶ 36-41.

[8] 47 C.F.R. §§ 21.50(b), 22.50(b), 94.59(b), and 94.59(f) (1994). We note that Part 21 and Part 94 microwave rules have been consolidated into new Part 101, which will become effective August 1, 1996.

[9] *ET Third Report and Order*, 8 FCC Rcd at 6595, ¶ 15; *see also* 47 C.F.R. § 94.59(f).

[10] *Id.* at ¶ 5.

[11] 47 C.F.R. § 94.59(c).

the facilities are indeed comparable, and if they are not, the emerging technology licensee must remedy the defects or pay to relocate the incumbent back to its former or an equivalent 2 GHz frequency.[12]

6. Under these procedures, it is possible for a relocation agreement between a PCS licensee and a microwave incumbent to have spectrum-clearing benefits for other PCS licensees as well. First, some microwave spectrum blocks overlap with one or more PCS blocks, because the spectrum in the 1850-1990 MHz band was assigned differently in the two services. Second, incumbents' receivers may be susceptible to adjacent or co-channel interference from PCS licensees in more than one PCS spectrum block. For example, a microwave link located partially in Block A, partially in Block D, and adjacent to Block B, may cause interference to or receive interference from PCS licensees that are licensed in each of those blocks. Third, because most 2 GHz microwave licensees operate multi-link systems, PCS licensees may be asked to relocate links that do not directly encumber their own spectrum or service area in order to obtain the microwave incumbent's voluntary consent to relocate. Finally, UTAM, Inc., the frequency coordinator for the PCS spectrum designated for unlicensed devices, expects that some licensed PCS providers will have to relocate links in the unlicensed band that are paired with links in licensed PCS spectrum.[13]

7. Because we are licensing PCS providers at different times and multiple PCS licensees may benefit from the relocation of a microwave system or even a single link, the first PCS licensee in the market potentially bears a disproportionate share of relocation costs. Subsequent PCS licensees to enter the market may therefore obtain a windfall. As a result of this potential "free rider" problem, the first PCS licensee in the market might not relocate a link or might delay its deployment of PCS if it believes that another PCS licensee will relocate the link first, thus paying for some or all of the relocation costs. In addition, unless cost-sharing is adopted, PCS licensees might not engage in relocation that is cost-effective if viewed from an industry-wide perspective. For example, a link that encumbers two PCS blocks might not be moved if the cost is greater than the benefit to any single licensee, even though the joint benefit received by two or more licensees exceeds the cost of relocating the link.

B. Pacific Bell Petition for Rulemaking

8. In 1994, PCIA proposed a cost-sharing plan to alleviate the free rider problem,

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[12] 47 C.F.R. § 94.59(e).

[13] The Commission has designated the Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management ("UTAM") to coordinate relocation in the 1910-1930 MHz band, which has been reallocated for unlicensed PCS devices. Once the 1910-1930 MHz band is clear, or there is little risk of interference to the remaining incumbents, and UTAM has recovered its relocation costs, UTAM's role will end and it will be dissolved. *See* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Fourth Memorandum Opinion and Order*, GEN Docket No. 9-314, 10 FCC Rcd 7955, 7957 (1995) (*"ET Fourth Memorandum Opinion and Order"*).

which we found to be attractive in theory but dismissed as underdeveloped.[14] On May 5, 1995, Pacific Bell ("PacBell") filed a *Petition for Rulemaking*. In its petition, PacBell proposed a detailed cost-sharing plan in which PCS licensees on all blocks, licensed and unlicensed, would share in the cost of relocating microwave stations. On May 16, 1995, we requested comment on PacBell's proposal.[15] Most parties that commented on PacBell's *Petition for Rulemaking* supported the cost-sharing concept, although the comments reflected some differences regarding the details of the proposal. On October 12, 1995, we adopted a *Notice of Proposed Rule Making*, which sought comment on a modified version of the plan proposed by PacBell.[16] A list of commenters is attached as Appendix C.

IV. FIRST REPORT AND ORDER

9. In the *Cost-Sharing Notice*, we proposed a number of changes and clarifications to the microwave relocation rules adopted in the *Emerging Technologies* docket.[17] We suggested that additional guidance with respect to certain aspects of our rules would facilitate negotiations, reduce disputes, and expedite deployment of PCS. As explained below, we adopt many of the changes and clarifications we proposed, along with some suggestions made by commenters. By adopting these rule changes and clarifications, as well as the cost-sharing plan discussed in Section B, *infra*, we intend to expedite the clearing of the 2 GHz band and the introduction of PCS to the public, while protecting the rights of incumbents. We seek to promote an efficient and equitable relocation process, which minimizes transaction costs and maximizes benefits for all parties, including incumbents, PCS licensees, and the public.

A. Microwave Relocation Rules

1. Voluntary Negotiations

10. Background. In the *ET Third Report and Order*, we established a voluntary period during which parties are encouraged to negotiate and reach agreement on relocation but are not required to do so.[18] As we stated in the *Cost-Sharing Notice*, negotiations are strictly voluntary during this period and are not defined by any parameters.[19] We also observed that the existing relocation procedures for microwave incumbents adopted in the *Emerging Technologies* docket were the product of extensive comment and deliberation prior to the

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[14] *See* PCIA Petition for Partial Reconsideration, GEN Docket No. 90-314 (filed July 25, 1994) at 5-7.

[15] *Public Notice*, Report No. 2073 (rel. May 16, 1995).

[16] *Cost-Sharing Notice*, 11 FCC Rcd 1923.

[17] *See generally Cost-Sharing Notice*, 11 FCC Rcd 1923.

[18] *ET Third Report and Order*, 8 FCC Rcd at 6595, ¶ 15.

[19] *Cost-Sharing Notice*, 11 FCC Rcd at 1927, ¶ 6.

initial licensing of PCS.[20] Thus, we stated that our intent was not to reopen that proceeding, because we believe that the general approach to relocation in our existing rules is sound and equitable.[21] Nevertheless, we sought comment on whether additional information about the value of the incumbent's 2 GHz system and the anticipated cost of relocation would help to facilitate negotiations.[22] For example, we suggested that two independent cost estimates -- prepared by third parties not associated or otherwise affiliated with either the incumbent licensee or the PCS provider -- could be filed with the Commission by parties that have not reached an agreement within one year after the commencement of the voluntary negotiation period.[23]

11. Comments. Despite the fact that we did not propose to alter the basic structure or length of the relocation negotiation periods in the *Cost-Sharing Notice*, some PCS licensees request that we shorten or dispose of the voluntary period.[24] They argue that incumbents are abusing the relocation process by demanding large premium payments or refusing to negotiate, and that the deployment of PCS is being delayed as a result.[25] Microwave incumbents, on the other hand, dispute that such actions are widespread and argue that we should not make the changes requested by PCS licensees because, *inter alia*, any such changes would be beyond the scope of this proceeding.[26]

12. In response to our inquiry about whether independent cost estimates should be required during the voluntary period, PCS licensees express their support and contend that such a requirement would facilitate stalled negotiations.[27] PCIA states that independent cost estimates that are disaggregated by link would give the parties an independent basis around which to come to an agreement, which would reduce the need to utilize dispute resolution procedures.[28] Western Wireless Corporation asserts, however, that requiring such estimates

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[20] *Id.* at ¶ 3.

[21] *Id.*

[22] *Cost-Sharing Notice*, 11 FCC Rcd at 1959, ¶ 78.

[23] *Id.*

[24] *See, e.g.*, Western Comments at 12; SBMS Comments at 3; STV Comments at 17; AT&T Comments at 14-15; CTIA Comments at 8; PCIA Comments at 14; Infocore Comments at 3-6.

[25] *See, e.g.*, AT&T Comments at 14-15; CTIA Comments at 8; PCIA Comments at 14; Omnipoint Reply Comments at 4.

[26] *See, e.g.*, Colorado Springs Utilities Reply Comments at 5; Entergy Reply Comments at 5; Omaha Public Power Reply Comments at 5.

[27] *See, e.g.*, PCIA Comments at 20; PrimeCo Reply Comments at 10; BellSouth Comments at 11-12.

[28] PCIA Comments at 20.

during the voluntary period as it now stands would be an exercise in frustration, because the parties are not even obligated to negotiate in good faith during the voluntary period.[29] Microwave incumbents argue that adopting such a requirement would impose an affirmative obligation on the parties during the voluntary period, which contradicts the voluntary nature of this period.[30]

13. Discussion. We agree with commenters who argue that the public interest would not be served by changing the rules regarding the voluntary period for the A and B blocks at this time.[31] First, the A and B block licensees who are now negotiating with incumbents were on notice of the voluntary period when they bid for their licenses, and they presumably have factored the length of the period and the potential cost of relocation into their bids. They have offered no persuasive justification to shorten the period now. Second, we note that many voluntary agreements have already been reached or are now being negotiated between A and B block licensees and incumbents. We are concerned that altering the voluntary period could inadvertently delay the deployment of PCS, because negotiations are likely to be interrupted while parties reassess their bargaining positions. Nevertheless, we agree with PCS licensees that changing the negotiation period for blocks other than the A and B blocks may not raise the same concerns, because negotiations in these blocks have not commenced. Therefore, in the *Further Notice of Proposed Rule Making* below, we seek comment on the possibility of adjusting the voluntary and mandatory negotiation periods for the D, E, and F blocks. We also seek comment on whether the same adjustments should be made to the negotiation periods for the C block.

14. Whether or not the negotiation periods are changed, we also agree with PCS licensees that additional information about the value of an incumbent's system, the estimated amount of time it would take to relocate the incumbent, and the anticipated cost of relocation may help facilitate negotiations during the voluntary period, as we suggested in the *Cost-Sharing Notice*.[32] Therefore, we require that, if the parties have not reached an agreement within one year after the commencement of the voluntary period, the incumbent must allow the PCS licensee, if the PCS licensee so chooses, to gain access to the microwave facilities to be relocated so that an independent third party can examine the incumbent's 2 GHz system and prepare an estimate of the cost and the time needed to relocate the incumbent to comparable facilities. The PCS licensee must pay for any such cost estimate. Because the one-year anniversary of the commencement of the voluntary period for A and B block licensees has already passed, this requirement shall become effective for the A and B block on the effective

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[29] Western Wireless Comments at 16.

[30] *See, e.g.*, API Comments at 16; UTC Comments at 26; Valero Comments at 5; City of Dallas Reply Comments at 4.

[31] *See, e.g.*, API Comments at 4, AAR Comments at 4, APCO Comments at 3-5.

[32] *Cost-Sharing Notice*, 11 FCC Rcd at 1959, ¶ 78; *see, e.g.*, PCIA Comments at 20; PrimeCo Reply Comments at 10; BellSouth Comments at 11-12.

date of the rules adopted in this proceeding. We disagree with incumbents that a cost estimate paid for by the PCS licensee changes the nature of the voluntary period, because participation in negotiations remains voluntary.

15. Finally, although we are not altering the basic structure or length of the voluntary period for A and B block PCS licensees, we emphasize that our rules provide incentives for voluntary agreements. We have stated in the past that PCS licensees may choose to offer incumbents premiums to relocate quickly.[33] "Premiums" could include: replacing the analog facilities with digital facilities, paying all of the incumbent's transactions costs, or relocating an entire system as opposed to just the interfering links. These incentives are available only to microwave incumbents who consent to relocation by negotiation. By contrast, PCS licensees are not obligated to pay for such premiums during an involuntary relocation, which is discussed in Section IV(A)(3), *infra*.

2. Mandatory Negotiations

16. Background. If a relocation agreement is not reached during the voluntary period, the PCS licensee may initiate a mandatory negotiation period. Like the voluntary period, the mandatory period is intended as a period of negotiation between the parties resulting in a contractual relocation agreement. The major difference between the voluntary period and the mandatory period is that (1) an incumbent may not refuse to negotiate once the mandatory period has commenced, and (2) the parties are required to negotiate in good faith.[34]

17. PCS licensees have requested that we provide guidance with respect to what constitutes good faith in the context of mandatory negotiations. In the *Cost Sharing Notice*, we proposed that, for purposes of the mandatory period, an offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities would be considered a good faith offer; whereas, failure on the part of an incumbent to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith.[35] We also sought comment on the appropriate penalty to impose on a licensee who does not negotiate in good faith during the mandatory period.[36]

18. Comments. PCS licensees support clarification of how the term good faith will be applied during the mandatory negotiation period, because they believe that additional guidance

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[33] *See, e.g., Cost-Sharing Notice*, 11 FCC Rcd at 1927, ¶ 6.

[34] 47 C.F.R. § 94.59(b); *see also ET Third Report and Order*, 8 FCC Rcd at 6595, ¶ 15.

[35] *Cost-Sharing Notice*, 11 FCC Rcd at 1955, ¶ 69.

[36] *Id.*

will facilitate negotiations.[37] CTIA also encourages us to establish rules which declare that demands by microwave incumbents that exceed twice the cost of comparable facilities are *prima facie* unreasonable and are evidence of bad faith during the mandatory period.[38] Furthermore, many PCS licensees argue that they should not have to pay to relocate an incumbent that does not negotiate in good faith.[39] CTIA recommends that microwave incumbents who fail to negotiate in good faith should have their licenses revoked and should lose their right to be relocated to new spectrum.[40] PCIA suggests that, if the incumbent fails to negotiate in good faith, the relocating PCS provider should only be required to tender a cash payment to the incumbent in an amount not to exceed the greater of two independent appraisals of what constitutes comparable replacement facilities.[41] U.S. Airwaves contends that it is premature to decide what penalty to apply if either party refuses to negotiate in good faith.[42]

19. By contrast, microwave incumbents argue that the clarification we proposed reflects an improper level of government management of negotiations and has no rightful place in the Commission's rules.[43] They also claim that enforcement of such a standard would be administratively burdensome on the Commission and may delay the relocation process.[44] Moreover, they assert that clarification of the term good faith is unnecessary, because local, state, and federal laws and regulations already govern how the term is applied in the context of contract negotiations.[45] Commenters also express uncertainty and confusion over how our proposed clarification of the term good faith would apply in practice. For example, incumbents voice concern over whether a counteroffer by an incumbent would constitute an act of bad faith.[46] In addition, incumbents claim that the proposed clarification is one-sided.[47]

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[37] *See, e.g.*, DCR Comments at 9; GTE Comments at 17; PacBell Comments at 9; PCIA Comments at 16; STV Comments at 18; US Airwaves Comments at 9; UTAM Comments at 14.

[38] CTIA Comments at 9.

[39] *See, e.g.*, PacBell Comments at 9-10; PrimeCo Comments at 17; UTAM Comments at 14.

[40] CTIA Comments at 9.

[41] PCIA Comments at 16-17.

[42] U.S. AirWaves Comments at 9.

[43] AAR Comments at 14; *see also* County of Los Angeles at 4; APCO Comments at 5.

[44] SoCal Comments at 18-19; *see also* APCO Comments at 5.

[45] *See, e.g.*, NRECA Comments at 6.

[46] *See, e.g.*, UTC Reply Comments at 21; AAR Comments at 14; APPA Comments at 3; County of LA Comments at 4; Tenneco Comments at 8.

They suggest that, if the provision is retained, a reciprocal obligation of good faith should be imposed on PCS licensees, which would require them to accept the incumbent's assessment of what constitutes comparable facilities.[48] Finally, microwave incumbents emphasize that the same penalties that apply to them should also be imposed on PCS licensees who fail to negotiate in good faith.[49]

20. Discussion. As the comments on this issue demonstrate, the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case.[50] We are concerned that creating a presumption that a party is acting in good or bad faith, as proposed in the *Cost-Sharing Notice*, may slow down resolution of disputes by prompting parties to bring claims of "bad faith" to the Commission prematurely rather than focusing on resolving the underlying disputes through the negotiation process.[51] For these reasons, we decline to adopt our proposal creating a presumption that a party who declines an offer of comparable facilities is acting in bad faith. Instead, we conclude that good faith should be evaluated on a case-by-case basis under basic principles of contract law.[52] Nevertheless, we agree with those commenters who suggest that guidance with respect to the factors we will consider if a dispute arises over good faith would be helpful.[53]

21. First, we believe that good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. For example, upon request by a PCS licensee, we expect incumbents to allow inspection of their facilities by the PCS licensee and to provide any other information that the PCS licensee needs in order to evaluate the cost of relocating the incumbent to comparable facilities. Second, when evaluating claims that a party has not negotiated in good faith, we will consider, *inter alia*, the following factors: (1) whether the PCS licensee has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) if the microwave incumbent has demanded a premium, the type of premium requested (*e.g.*, whether the premium is directly related to relocation, such as system-wide relocations and analog-to-digital conversions, versus other types of premiums) and whether the value of the premium as compared to the cost of providing comparable

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[47] *See, e.g.*, AAR Comments at 14; APPA Comments at 3, Tenneco Comments at 8; UTC Comments at 18-19; API Reply Comments at 14-15.

[48] *Id.*

[49] *See, e.g.*, UTC Reply Comments at 21.

[50] *See, e.g.*, County of Los Angeles at 4.

[51] *See, e.g.*, SoCal Comments at 18; APCO Comments at 5.

[52] *See, e.g.*, NRECA Comments at 6.

[53] *See, e.g.*, U.S. Airwaves Comments at 9.

facilities is disproportionate (*i.e.*, whether there is a lack of proportion or relation between the two); (3) what steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (4) whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process.

22. To ensure that parties do not bring frivolous bad faith claims, we will also require any party alleging a violation of our good faith requirement to provide an independent estimate of the relocation costs of the facilities in question. Independent estimates must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee. These cost estimates are similar to the cost estimates that we require if a dispute arises over comparable facilities during the involuntary relocation period.[54] We believe that requiring such estimates will assist us in determining whether the parties are negotiating in good faith. Finally, we agree with those commenters who argue that penalties for failure to negotiate in good faith should be imposed on a case-by-case basis.[55] We emphasize, however, that we intend to use the full realm of enforcement mechanisms available to us in order to ensure that licensees bargain in good faith.[56]

3. Involuntary Relocation

23. If no agreement is reached during either the voluntary or mandatory negotiation period, a PCS licensee may initiate involuntary relocation procedures.[57] Under involuntary relocation, the incumbent is required to relocate, provided that the PCS licensee meets the conditions under our rules for making the incumbent whole, such as providing the incumbent with comparable facilities.[58]

a. Comparable Facilities

24. Background. Our rules require PCS licensees to provide microwave incumbents with comparable facilities as a condition for involuntary relocation.[59] In the *Emerging Technologies* docket, we stated that, in any case brought to us for resolution, we would require that facilities be equal to or superior to existing facilities to be considered comparable.[60] To

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[54] *ET Second Memorandum Opinion and Order*, 9 FCC Rcd at 7801, ¶¶ 29-31.

[55] *See, e.g.*, AAR Comments at 14; County of Los Angeles Comments at 4.

[56] *See, e.g.*, 47 U.S.C. §§ 312, 503.

[57] 47 C.F.R. § 94.59.

[58] 47 C.F.R. § 94.59(c).

[59] *See* 47 C.F.R. § 94.59(c)(3); *see also ET Third Report and Order*, 8 FCC Rcd at 6591, ¶ 5.

[60] *Id.*

determine comparability, we said that we would consider, *inter alia*, system reliability, capability, speed, bandwidth, throughput, overall efficiency, bands authorized for such services, and interference protection.[61] PCS licensees subsequently urged us to specify the elements that constitute a comparable facility in order to remove ambiguity and expedite negotiations.[62]

25. In the *Cost-Sharing Notice*, we proposed to clarify the definition of comparable facilities by using the following three factors to determine when a facility is comparable: *communications throughput, system reliability,* and *operating cost.*[63] We defined communications throughput as the amount of information transferred within the microwave system for a given amount of time, system reliability as the amount of time it takes for information to be accurately transferred within the system, and operating cost as the cost to operate and maintain the system.[64] Thus, we proposed that a replacement facility would be presumed comparable if the new system's communications throughput and reliability are equal to or greater than that of the system to be replaced, and the operating costs of the replacement system are equal to or less than those of the existing system. We also suggested that comparable replacement facilities could be provided by "trading off" system parameters, which would permit the PCS licensee to compensate for certain factors by substituting others, provided that overall comparability is achieved in the three essential areas we have identified.[65]

26. Comments. Overall, microwave incumbents, PCS licensees, and other commenters agree that the three factors we identified are the most critical for purposes of determining comparability.[66] PCS licensees support clarification as a means of adding certainty to the process, facilitating negotiations, and reducing the number of disputes that may otherwise arise.[67] Although microwave incumbents generally agree that we have identified the three most important factors of comparability, they express concern that permitting PCS licensees to trade

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[61] *Id.*

[62] *See Cost-Sharing Notice* at 1956, ¶ 71 (discussing requests by McCaw and Southwestern Bell for further clarification of what constitutes comparable facilities).

[63] *Cost-Sharing Notice*, 11 FCC Rcd at 1957, ¶ 73.

[64] *Id.* at ¶ 74.

[65] We stated that communications throughput may be increased by using equipment with a more efficient modulation technique, and system reliability may be improved by using better equipment, by adding redundancy in system design (*e.g.*, multiple receive antennas), or by providing additional coding, such as forward error correction. As an example of a trade-off, we suggested that obtaining the same throughput with the same reliability might be possible by using a more efficient modulation technique, even though a smaller bandwidth is used. *Cost-Sharing Notice*, 11 FCC Rcd at 1958, ¶ 75.

[66] *See, e.g.*, UTC Comments at 20-21; APPA Comments at 3; CIPCO Comments at 21; GTE Comments at 18; PacBell Comments at 7; Southern Comments at 10; UTAM Comments at 15.

[67] *See, e.g.*, DCR Comments at 10; GTE Comments at 17; PacBell Comments at 7.

off system parameters will allow them to compromise on certain aspects of comparability by attempting to compensate with other factors.[68] More specifically, incumbents argue that PCS licensees should not be permitted to cut corners on one aspect of comparability, such as reliability, and make up for it in another aspect, such as operating costs or throughput.[69] UTC contends that PCS licensees do not have sufficient knowledge or expertise regarding the incumbent's operational requirements to dictate appropriate trade-offs.[70] By contrast, PCS licensees emphasize that permitting parties to trade-off system parameters promotes flexibility.[71] They stress that comparability should be defined in terms of functionality and performance, rather than whether an offer is made to provide identical equipment.[72]

27. Discussion. We conclude that the factors we identified -- communications throughput, system reliability, and operating costs -- will be the three factors used to determine when a facility is comparable. As we stated in the *Cost-Sharing Notice*, we believe that providing guidance with respect to the term comparable facilities will facilitate negotiations and reduce disputes.[73] The record in this proceeding also supports adoption of the factors we have identified. Each factor is discussed in more detail below.

28. *Throughput.* We define communications throughput as the amount of information transferred within the system in a given amount of time. For analog systems the throughput is measured by the number of voice channels, and for digital systems it is measured in bits per second ("bps"). Therefore, if analog facilities are being replaced by analog facilities, the PCS licensee will be required to provide the incumbent with an equivalent number of 4 kHz voice channels. If an existing digital system is being replaced by digital facilities, the PCS licensee will be required to provide the incumbent with equivalent data loading bps in order for the system to be considered comparable. We agree with commenters that the more difficult issue will be determining equivalent throughput when analog equipment is being replaced with digital equipment, which can be like comparing "apples with oranges."[74] If disputes arise, we will determine on a case-by-case basis whether comparable throughput has been achieved. For guidance, we plan to refer to other parts of our rules where analog-digital comparisons have been made, such as the minimum channel loading requirements for fixed point-to-point

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[68] *See, e.g.*, APPA Comments at 6; UTC Comments at 20-21.

[69] *See, e.g.*, API Comments at 13.

[70] UTC Comments at 22-23.

[71] *See, e.g.*, UTAM Comments at 16.

[72] *See, e.g.*, DCR Comments at 10; CTIA Comments at 9-10; GTE Comments at 18; PCIA Comments at 18.

[73] *Cost-Sharing Notice*, 11 FCC Rcd at 1956, ¶ 72.

[74] *See, e.g.*, AUE Comments at p. 5.

microwave systems in Section 21.710(d).[75]

29. We also conclude that, during involuntary relocation, PCS licensees will only be required to provide incumbents with enough throughput to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system, as some microwave incumbents suggest.[76] For example, we will not require that a 2 GHz incumbent with 5 MHz of bandwidth be relocated to a 5 MHz bandwidth, 6 GHz location when its current needs only justify a 1.25 MHz bandwidth system. If a dispute arises, we will determine what an incumbent's needs are by looking at actual system use rather than total capacity at the time of relocation. We expressly adopted channelization plans for the 6 GHz band with bandwidth requirements ranging from 400 kHz to 30 MHz to increase the efficiency of use by point-to-point microwave operations. Although we recognize that this policy may affect an incumbent's ability to increase its capacity over time, we agree with PCS licensees that the public interest would not be served if spectrum is automatically held in reserve for all incumbents with the expectation that some may require additional capacity in the future.[77] Our goal is to foster efficient use of the spectrum, which would be thwarted if all incumbents are relocated to systems with capacity that exceeds their current needs. Also, limiting spectrum to current needs serves the public interest, because we believe that it will promote the development of spectrum-efficient technology capable of increasing capacity without increasing bandwidth.

30. *Reliability.* We define system reliability as the degree to which information is transferred accurately within the system. As stated in the *Cost-Sharing Notice,* the reliability of a system is a function of equipment failures (*e.g.*, transmitters, feed lines, antennas, receivers, battery back-up power, etc.), the availability of the frequency channel due to propagation characteristic (*e.g.*, frequency, terrain, atmospheric conditions, radio-frequency noise, etc.), and equipment sensitivity. We define comparable reliability as that equal to the overall reliability of the incumbent system, and we will not require the system designer to build the radio link portion of the system to a higher reliability than that of the other components of the system. For example, if an incumbent system had a radio link reliability of 99.9999 percent, but an overall reliability of only 99.999 percent because of limited battery back-up power, we require that the new system have a radio link reliability of 99.999 percent to be considered comparable. For digital data systems this would be measured by the percent of time the bit error rate ("BER") exceeds a desired value, and for analog or digital voice transmissions this would be measured by the percent of time that audio signal quality met an

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[75] 47 C.F.R. § 21.710(d).

[76] API Comments at 13.

[77] *See, e.g.*, Western Comments at 13-14.

established threshold.[78] If an analog voice system is replaced with a digital voice system the resulting frequency response, harmonic distortion, signal-to-noise ratio, and reliability would be the factors considered. We decline to adopt AUE's request that we include a "system age" component that takes into account how the age of a given system can affect system reliability, because we do not have enough information to determine how age will affect a given system.[79] Moreover, we believe that older equipment of high quality may be as reliable as newer equipment of low quality.

31. *Operating Costs.* We define operating costs as the cost to operate and maintain the microwave system. These costs fall into several categories. First, the incumbent must be compensated for any increased recurring costs associated with the replacement facilities (*e.g.*, additional rental payments, increased utility fees). Although we originally proposed that recurring costs should be limited to a ten-year license term,[80] we are persuaded by PCS licensees that a five-year time period -- which is the length of a microwave license in the 1850-1990 MHz band[81] -- is a more appropriate time frame, because it strikes an appropriate balance between the burden placed on PCS licensees who must relocate many incumbents, and the burden placed on incumbents that are being forced to relocate.[82] Furthermore, we believe that the five-year time period is not unfair to incumbents because, by five years from now, many incumbents would have been forced to bear some of these costs themselves -- such as increased rents -- if they had not already been relocated by PCS licensees. Moreover, we are also persuaded that a five-year time period provides incumbents with sufficient time for budget planning and resource allocation to meet such expenses once the five-year period expires. Finally, we conclude that a PCS licensee is permitted but not required to satisfy its obligation by making a lump-sum payment based on present value using current interest rates, as suggested by some incumbents.[83]

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[78] Under this approach, for a replacement digital systems to be comparable, the data rate throughput must be equal to or greater than that of the incumbent system with an equal or greater reliability. For example, an incumbent system with a data rate of 10 Mbps with a BER of .0001 would have to be replaced with a system of at least these rates to be comparable. For analog systems, an equivalent or greater number of voice or data channels with an equivalent or greater reliability would have to be provided to have a comparable facility. For example, an incumbent system that provided 24 voice channels with a reliability of 99.9999 percent would have to be replaced with a system of at least an equivalent number of channels and reliability.

[79] AUE Comments at 6.

[80] *Cost-Sharing Notice*, 11 FCC Rcd at 1957, ¶ 74.

[81] 47 C.F.R. § 94.39.

[82] *See, e.g.*, PCIA Comments at 19 (stating that reimbursement for increased costs should be limited to a single five-year term, because the term of a microwave license is typically five years.); *see also* PacBell Comments at 7.

[83] *See, e.g.*, CIPCO Comments at 1-2; NRECA Comments at 6.

32. Second, increased maintenance costs must be taken into consideration when determining whether operating costs are comparable. As several commenters point out, maintenance costs associated with analog systems are frequently higher than the costs for equivalent digital systems, because manufacturers are producing mostly digital equipment and analog replacement parts can be difficult to find.[84] We decline to adopt API's suggestion that "serviceability"-- which would require that access to those elements essential to restoration of service be equal to or greater than the original system -- should be adopted as a fourth element, however, because we believe that the ease of servicing the equipment will affect repair costs, which will be factored into operating costs.[85] Furthermore, we agree with incumbents that, in some instances, the operating costs of 6 GHz analog equipment might be so high that analog replacement facilities would not qualify as comparable.[86] On the other hand, if an available analog replacement system would provide equivalent technical capability without increasing the incumbent's operating costs or sacrificing any of the other factors we have identified, we agree with PCS licensees that such an analog system would be acceptable.[87] In sum, our goal is to ensure that incumbents are no worse off than they would be if relocation were not required, not to guarantee incumbents superior systems at the expense of PCS licensees.

33. *Trade Offs.* We also conclude that comparable replacement facilities may not be provided by trading off any of the system parameters discussed above. Thus, we agree with incumbents that PCS licensees should not be permitted to compromise on one aspect of comparability, such as system reliability, by compensating with another factor, such as increased throughput.[88] Based on the record in this proceeding, we believe that the factors we have identified are central to the concept of comparability, and therefore the replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the incumbent's existing system with respect to system reliability, throughput, and operating costs.[89] However, other aspects of the system (*e.g.*, bandwidth) do not have to be equivalent to the incumbent's original 2 GHz system. As PCS licensees point out, it might be possible to achieve comparability with respect to the three main factors, even though all of the features on the replacement equipment are not identical to those of the original system.[90] Other media,

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[84] *See, e.g.*, API Comments at 17; APCO Comments at 6.

[85] API Comments at 14.

[86] *See e.g.*, API Comments at 13-14, AUE Comments at 4.

[87] *See, e.g.*, PrimeCo Comments at 18; PCIA Comments at 20-21.

[88] *See, e.g.*, API Comments at 13.

[89] *See, e.g.*, UTC Comments at 20-21; APPA Comments at 3; CIPCO Comments at 21; GTE Comments at 18; PacBell Comments at 7; Southern Comments at 10; UTAM Comments at 15.

[90] *See, e.g.*, DCR Comments at 10; CTIA Comments at 9-10; GTE Comments at 18; PCIA Comments at 18.

such as land lines, would also be acceptable, provided that comparability is achieved.

34. *Depreciation.* In the *Cost-Sharing Notice*, we also sought comment on whether and how depreciation of equipment and facilities should be taken into account, and whether it would be appropriate for a PCS licensee to compensate an incumbent only for the depreciated value of the old equipment.[91] Some PCS licensees contend that depreciation should be taken into account during the mandatory period as a means of encouraging incumbents to accept offers during the voluntary period.[92] We are persuaded by incumbents, however, that compensation for the depreciated value of old equipment would not enable them to construct a comparable replacement system without imposing costs on the incumbent, which would be inconsistent with our relocation rules.[93] We therefore conclude that the depreciated value of old equipment should not be a factor when determining comparability.

b. Relocating Individual Links

35. Background. In the *Emerging Technologies* docket, we concluded that PCS licensees are obligated to pay to relocate incumbents to comparable facilities when the PCS systems pose an interference problem to the incumbents' microwave links.[94] In the *Cost-Sharing Notice*, we stated that, while we encourage PCS licensees to relocate an entire microwave system at once -- including non-interfering links outside the PCS licensee's particular service area -- we do not regard this as a requirement under involuntary relocation.[95] With respect to those links that do cause interference, however, PCS licensees must provide incumbents with a seamless transition from the old facilities to the replacement facilities.[96] Thus, it may be both more efficient and more cost-effective in many instances for the parties to relocate all of the links in a system at once, rather than to relocate only a few links and provide the necessary equipment for the microwave incumbent to operate in two different bands simultaneously.

36. Comments. Microwave incumbents strongly oppose the relocation of a single link if the link is part of a larger, multi-link system.[97] They argue that selected link-by-link relocation will destabilize the integrity of microwave systems, reduce manageability, impair

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[91] *Cost-Sharing Notice*, 11 FCC Rcd at 1959, ¶ 77.

[92] *See, e.g.*, PacBell Comments at 8.

[93] *See, e.g.*, API Comments at 16.

[94] *See generally ET Memorandum Opinion and Order*, 9 FCC Rcd at 1944-45, ¶¶ 1-8.

[95] *Cost-Sharing Notice*, 11 FCC Rcd at 1958, ¶ 76.

[96] *See* 47 C.F.R. § 94.59; *see also ET First Report and Order*, 7 FCC Rcd at 6886, ¶ 24.

[97] *See, e.g.*, WWI Comments at 3-4; Tenneco Comments at 9.

throughput, and increase operational costs.[98] Although UTC agrees that a PCS licensee's relocation obligation extends only to those specific microwave paths to which the PCS licensee causes interference, it argues that the obligation to provide a seamless transition may require the PCS licensee to relocate additional links or pay the additional costs associated with integrating replacement links in different bands.[99] By contrast, PCS licensees contend that incumbents' concerns are overstated.[100] PCS PrimeCo, for example, points out that incumbents who are phasing in digital technology are voluntarily converting a few links at a time, which necessarily involves a network comprised of a combination of analog and digital links.[101]

37. Discussion. We affirm our decision in *Emerging Technologies* docket that PCS licensees are obligated to pay to relocate incumbents to comparable facilities only with respect to the specific microwave links for which their systems pose an interference problem.[102] Thus, we clarify that PCS licensees are not under an obligation to move an incumbent's entire system at once, unless all of the links in the incumbent's system would be subject to interference by the PCS licensee. Although system-wide relocations may be preferable and less disruptive to the incumbent, we conclude that it would be inappropriate to increase a PCS licensee's monetary obligation, *e.g.*, by requiring it to pay to relocate links that it never intended to move, after the licenses have already been auctioned. In fact, several commenters -- particularly those bidding in the C block auction -- have stated in their comments that they are intentionally designing their systems in such a way that existing links will not have to be relocated.[103] Moreover, incumbents are not harmed by this policy because, as PCS licensees point out, many incumbents already operate networks that consist of both 2 GHz and 6 GHz links or a combination of digital and analog technology.[104] Furthermore, our rules protect microwave operations by requiring PCS licensees to provide incumbents with a seamless transition from their old facilities to the replacement facilities.[105] Thus, if providing a seamless transition requires it, PCS licensees must relocate additional links or pay for additional costs

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[98] WWI Comments at 3-4.

[99] UTC Comments at 23-24; *see also* TIA Reply Comments at 6; API Comments at 14-15 (stating that in some instances, like a rock thrown into a pond, relocation of one link in a system may have a ripple effect upon the remainder of the system).

[100] *See, e.g.*, PrimeCo Reply Comments at 11.

[101] PrimeCo Reply Comments at 11.

[102] *ET Memorandum Opinion and Order*, 9 FCC Rcd at 1944-45, ¶¶ 1-8.

[103] GO Comments at 6; SBMS Reply Comments at 6.

[104] PrimeCo Reply Comments at 11. Also, in Tenneco's *ex parte* filing, dated February 13, 1996, Tenneco submitted a map of its current microwave system, showing links operating at the following frequencies: 2.1 GHz; 6 GHz; and 1.9 GHz.

[105] 47 C.F.R. § 94.59(d).

associated with integrating the new links into the old system, such as employing a different modulation technique to preserve the system's overall integrity.[106] If problems arise, the PCS licensee is required under our rules to remedy the situation.[107]

38. To ease the burden on incumbents, we have adopted a cost-sharing plan to promote the relocation of all links in a system at the same time, which is discussed in Section IV(B), *supra*. By enabling PCS licensees to collect reimbursement from subsequent licensees that benefit from the relocation, we believe that our cost-sharing plan will promote a larger number of system-wide relocations.

c. Transaction Expenses

39. Background. In the *Emerging Technologies* docket, we stated on several occasions that emerging technology providers will be required to pay all costs associated with relocation.[108] In the *Cost-Sharing Notice*, however, we sought comment on whether we should narrow this rule by requiring that reimbursement for relocation costs should be limited to the actual costs associated with providing a replacement system, *e.g.*, equipment and engineering expenses.[109] We proposed to exclude extraneous expenses, such as fees for attorneys and consultants, that are incurred by the incumbent without the advance approval of the PCS relocator.[110] We sought comment on whether such extraneous expenses should be considered "premium payments" that are not reimbursable after the voluntary negotiation period has concluded.[111]

40. Comments. Microwave incumbents argue that they should be reimbursed for all expenses they incur as a result of relocation, and that they should not be required to seek the PCS licensee's prior approval.[112] They contend that the exclusion of such expenses contradicts the principle of full compensation for relocation costs that was adopted in the *ET Third Report*

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[106] UTC Comments at 24.

[107] 47 C.F.R. § 94.59(e).

[108] *See, e.g., ET Third Report and Order*, 8 FCC Rcd at 6595, ¶ 16; *ET Second Memorandum Opinion and Order*, 9 FCC Rcd at 7800, ¶ 22.

[109] *Cost-Sharing Notice*, 11 FCC Rcd at 1958, ¶ 76.

[110] *Id.*

[111] *Id.*

[112] *See, e.g.*, APCO Comments at 8-9; CIPCO Comments at 1; San Diego Comments at 10-11; East River Comments at 2; LA County Comments at 5-6; NRECA Comments at 5; Santee Cooper Comments at 2; SoCal Comments at 8; UTC Comments at 24-25.

and Order.[113] According to incumbents, relocation negotiations are highly technical, and the exclusion of such fees would deprive them of the ability to contribute meaningfully and effectively to the negotiation process.[114] In addition, APCO asserts that incumbents, especially public safety licensees with limited budgets, should be entitled to reimbursement for reasonable internal expenses as well.[115] As an example, APCO states that an incumbent may choose to commit the time of its own engineers and attorneys (rather than hiring outside experts) and, in such circumstances, the incumbent should be reimbursed for that overhead, based on standard accounting principles.[116] Nonetheless, some incumbents recognize the potential for abuse if fees for attorneys and consultants are fully reimbursable without limitation. As a way to contain such expenses, CIPCO suggests that we impose a cap, such as $5,000 per link for legal expenses.[117] Cox & Smith suggest that maximum fees could be established based on the number of paths being relocated or on a percentage of the total "hard" costs involved in the relocation (*e.g.*, equipment, new towers, site acquisition).[118]

41. PCS licensees insist that they should not have to pay for attorney and consultant fees incurred by incumbents.[119] They argue that some incumbents are hiring costly consultants in an effort to extract premiums from PCS licensees, and that they should not be required to pay such fees for incumbents that view the relocation process as a profit-making business opportunity.[120] As a solution, Sprint Telecommunications Venture proposes that PCS licensees be responsible for paying only those costs which can be legitimately and reasonably tied to the relocation process.[121] BellSouth suggests that legal and consulting fees be recoverable only if an agreement is reached during the voluntary period, so that incumbents will have an incentive to reach an agreement prior to the mandatory period.[122]

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[113] APPA Comments at 7; *see also ET Third Report and Order*, 8 FCC Rcd 6589.

[114] *See, e.g.*, AAR Comments at 7.

[115] APCO Comments at 9

[116] *Id.*

[117] CIPCO Comments at 1.

[118] Cox & Smith Comments at 4.

[119] *See, e.g.*, PacBell Comments at 8; PrimeCo Comments at 18; UTAM Comments at 15-16.

[120] BellSouth Reply Comments at 18 (stating that one incumbent paid a consultant $180,000 to negotiate the relocation of only four paths); STV Reply Comments at 14, n. 22 (stating that the consultant agreement between the City of San Diego and the law firm of Keller and Heckman includes the preparation of an economic assessment that reviews, *inter alia*, the value of the vacated spectrum to the PCS licensee).

[121] STV Reply Comments at 13.

[122] BellSouth Reply Comments at 18.

42. Discussion. We conclude that incumbents should be reimbursed only for legitimate and prudent transaction expenses that are directly attributable to an involuntary relocation, subject to a cap of two percent of the "hard" costs involved (*e.g.*, equipment, new towers, site acquisition). Although we proposed in the *Cost-Sharing Notice* that PCS licensees should not be required to reimburse incumbents for any "extraneous" expenses, such as fees for attorneys and consultants, we are persuaded by commenters that some reimbursement for outside assistance is necessary, because not all incumbents have expertise in these fields within their organizations.[123] We conclude that PCS licensees are not required to pay incumbents for internal resources devoted to the relocation process, however, because such expenses are difficult to determine and would be too hard for a PCS licensee to verify. Moreover, the benefits incumbents receive as a result of relocation, such as superior equipment, are likely to outweigh any internal costs they incur.

43. To prevent abuses, PCS licensees will not be required to reimburse incumbents for transaction costs that exceed two percent of the hard costs associated with an involuntary relocation. Rather than adopt a cap on the dollar amount that can be spent on transaction expenses, we believe that a percentage of the total hard costs, as suggested by Cox & Smith, is more appropriate.[124] Therefore, if complicated and costly actions, such as land acquisition, are required to accomplish relocation, the permissible amount of reimbursement for transaction costs would be higher. We also believe that a two-percent cap is reasonable and strikes a fair balance between the concerns of PCS licensees and microwave incumbents. We derived two percent from CIPCO's suggested cap of $5,000 per link,[125] which is two-percent of $250,000 -- the amount we have determined to be the average cost of relocating a link.[126] Furthermore, PCS licensees will not be required to pay for transaction costs incurred by incumbents during the voluntary or mandatory negotiation periods once an involuntary relocation is initiated, nor will they be required to pay for fees that cannot be legitimately tied to the provision of comparable facilities, such as consultant fees for determining how much of a premium payment PCS licensees would be willing to pay. We agree with PCS licensees that they should not have to reimburse incumbents for such fees, because it would encourage incumbents to view the relocation process as a business opportunity.[127] Furthermore, requiring PCS licensees to pay such fees does not serve the public interest, because added expenses are likely to be passed on to the public in the form of increased PCS subscriber fees.

d. Twelve-Month Trial Period

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[123] San Diego Comments at 10-11; LA County Comments at 5-6.

[124] Cox & Smith Comments at 4

[125] CIPCO Comments at 1.

[126] *Cost-Sharing Notice*, 11 FCC Rcd at 1943, ¶ 43.

[127] *See, e.g.*, AT&T Reply Comments at 13.

44. Background. Our existing rules provide a twelve-month period for relocated microwave incumbents to ensure that their new facilities are comparable.[128] If the new facility is found not to be comparable during the first twelve months of operation, our rules provide that the PCS licensee must either cure the problem, restore the incumbent to its original frequency, or relocate it to an equivalent 2 GHz frequency.[129] The purpose of the twelve-month trial period is to ensure that microwave incumbents have a full opportunity to operate their new systems under real-world operating conditions and to obtain redress from the PCS licensee if the new system does not perform comparably to the old system or pursuant to agreed-upon terms. In the *Cost-Sharing Notice*, we proposed to clarify that this period should begin when the incumbent starts using its new system.[130] We also tentatively concluded that the right to a twelve month trial period resides with the incumbent as a function of our relocation rules, regardless of whether the incumbent has previously surrendered its license. If the incumbent has retained its 2 GHz authorization during the twelve-month trial period, however, it should surrender the license at the conclusion of that period.

45. Comments. Most commenters agree with our proposals, but suggest that some rules need further clarification.[131] A number of commenters request that we clarify that the twelve-month trial period only applies if an involuntary relocation occurs and that, during the voluntary period, the parties may agree to any length trial period or none at all.[132] PCIA, UTAM, and others also argue that we should not hold PCS providers responsible for the performance of relocated systems which they did not construct.[133] Some PCS licensees argue that our current rules may unduly delay or inhibit the deployment of PCS and, therefore, suggest rule changes such as (1) reducing the trial period to one month, or (2) clarifying that, if the new facilities are not comparable, the PCS licensee may provide comparable service by some means other than relocation back to 2 GHz spectrum.[134]

46. Microwave incumbents oppose reduction of the twelve-month trial period.[135] They

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[128] 47 C.F.R. § 94.59(e).

[129] 47 C.F.R. § 94.59(e).

[130] *Cost-Sharing Notice*, 11 FCC Rcd at 1962, ¶ 84.

[131] *See, e.g.*, API Comments at 18; GTE Comments at 18; UTC Comments at 27-28.

[132] Western Comments at 16. *See also* BellSouth Comments at 11; GTE Comments at 18-19; PCS PrimeCo Comments at 20; UTAM Comments at 19-20; Chester Telephone Reply Comments at 5; DCR Reply Comments at 3-4.

[133] PCIA Comments at 21; UTAM Comments at 19-20; SBMS at 4-5.

[134] *See, e.g.*, PrimeCo Comments at 20; PCIA Comments at 21.

[135] *See, e.g.*, Cooperative Power Reply Comments at 2; Entergy Reply Comments at 7; Omaha Public Power District Reply Comments at 7.